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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. RAYMOND PAUL AGUILAR, Defendant and Respondent.	E049000 (Super.Ct.No. RIF144711) OPINION

APPEAL from the Superior Court of Riverside County. Janice M. McIntyre, Judge. (Retired judge of the Riverside Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Reversed with directions.

Rod Pacheco, District Attorney, and Matt Reilly, Deputy District Attorney, for Plaintiff and Appellant.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

This is a People's appeal in the case of defendant and respondent Raymond Paul Aguilar. The trial court, sitting as a magistrate, held defendant to answer on a charge of

assault by means of force likely to produce great bodily injury, and one count of infliction of corporal injury on a spouse or cohabitant. Several months later, the same judge heard defendant's motion to dismiss under Penal Code section 955,[1] dismissed the assault count, and reduced the corporal injury offense from a felony to a misdemeanor. The People appeal, contending: (1) it was improper for the judge to sit both as a magistrate and as a superior court judge, in review of her own rulings as a magistrate; (2) the court erred in dismissing the assault count; and (3) the court improperly reduced a charged felony to a misdemeanor before judgment. We reverse.

FACTS AND PROCEDURAL HISTORY

In July 2008, the People filed a felony complaint listing three charges against defendant: count 1, assault with a deadly weapon "other than a firearm, to wit: DRAWER, and by means likely to produce great bodily injury," count 2, infliction of corporal injury on a spouse or cohabitant, and count 3, misdemeanor defacing, damage or destruction of property.

Judge Janice M. McIntyre presided over the preliminary hearing on October 15, 2008. Defendant's girlfriend (the victim) testified that they had been in a relationship for eight years, they had lived together for four or five years, and they had a three-year-old child. In the early morning hours of June 18, 2008, at approximately 6:00 a.m., the victim went to bed after having a lot to drink during the night. The victim testified that she and defendant got into a drunken altercation, during which defendant had threatened

[1] All further statutory references are to the Penal Code unless otherwise indicated.

to break up with the victim. Defendant had apparently also broken a picture frame or mirror.

Police were called to the scene, and the victim told police officers that defendant had hit her with his fist and punched her in the head. She testified at trial, however, that none of that had happened, and that she had lied to police to get back at and to aggravate defendant for wanting to break up with her. She explained that she had taken some medication, had been drinking, and was "over exaggerating," and "just doing anything to get upset with [defendant]."

When asked if defendant had caused any damage other than to the picture frame, the victim testified that defendant had "a plastic thing that he kept some clothes in," and that the plastic container had fallen apart. She stated that "it just basically falls apart every time you lift it up. So he just picked it up and it fell apart."

The victim testified that, at the time of the incident, she felt pain in her head, but ascribed the pain simply to aggravation. She said, "[a]t one point, I think I actually had hit myself," because she was so upset. She remembered telling the police that her wrist and head hurt; she had a bump on her forehead, but she testified at the preliminary hearing that the bump may have already been there before the altercation.

The prosecutor asked, "Do remember telling the officer that [defendant] had grabbed a plastic container and smashed it against the back of your head?" The victim replied, "I remember telling him he picked up the plastic piece and threw it. I don't remember telling him that he hit me with it, no."

The victim viewed some photographs of the home in disarray. She identified in one of the photographs a "mirrored closet door that I think I had kicked that day." The victim did remember telling police that defendant had broken a picture frame.

In cross-examination, the victim was asked, "You talked a little bit earlier about some plastic container or holder. Was that like a drawer?" The victim affirmed, "Yeah." The victim said that defendant was holding the container in his hands, when she said some things to aggravate him. "And he dropped it at one point and I kicked him in the leg at one point. I don't really remember."

The victim explained her sore wrist was "[p]robably from me throwing something or hitting my wrist on [defendant]. . . . I don't really remember."

At the conclusion of the evidence, the court found "sufficient evidence to believe the offenses alleged in Counts I, II, and III have been committed by the defendant."

Following these findings, defendant was charged by information with the same offenses as originally alleged in the complaint, i.e., in count 1 with assault "with a deadly weapon other than a firearm, to wit: a DRAWER, and by means of force likely to produce great bodily injury"; in count 2 with infliction of corporal injury on a spouse or cohabitant, and in count 3 with misdemeanor vandalism.

In June 2009, nearly eight months after the preliminary hearing, defense counsel filed a motion to dismiss the felony charges in counts 1 and 2. The motion relied on the victim's testimony that she had lied to police when she told them defendant had hit her, the injuries to the victim's forehead were old injuries, and the victim's denial that

defendant had hit her with the plastic container. She also denied telling police that she had been hit with the container.

The defense urged that the evidence was thus insufficient to hold defendant to answer on a charge of assaulting the victim with the plastic drawer. At most, the victim testified that defendant had thrown the drawer. In the absence of rebuttal from any police officer, there was no evidence to show that defendant had assaulted the victim with the drawer.

Defendant also argued that the evidence was insufficient to hold him to answer on a charge of corporal injury to a spouse or cohabitant, as there was no evidence of any injury or traumatic condition. The victim testified that she had some pain in her head and wrist, but she ascribed those conditions to her own actions. She had a bump on her forehead, but she stated that was a previously existing condition.

The prosecution countered with the argument that the victim did testify that she and defendant had an altercation, she agreed that defendant did pick up the drawer, and she admitted he had thrown it. She admitted that she had told police defendant had hit and punched her. She admitted he had broken the picture frame; she at least once (perhaps mistakenly) referred to defendant having broken a "mirror," and she identified a photograph showing a broken mirrored closet door, although she testified that she had kicked in the mirror herself. She also described chasing and running through the halls. Her attempts to minimize or deflect blame from defendant to herself were insufficient to wholly remove the reasonable inference that defendant had, in fact, thrown the plastic drawer at her. The People also argued the evidence was sufficient to support the charge

of corporal injury to a cohabitant. The victim did have a bump on her head which, "[e]ven though . . . [it may] not be a major injury, it is still considered a minor injury within the meaning of [section] 273.5[, subdivision](a)."

Judge McIntyre, sitting as a judge of the superior court rather than as a magistrate, heard the motion to dismiss. The court granted the motion to dismiss the assault charge, and denied the motion as to the charge of corporal injury to a spouse or cohabitant. The court heard an oral motion by defense counsel to reduce count 2 (corporal injury) to a misdemeanor under section 17, subdivision (b). At the hearing itself, the People argued that the evidence on count 1 was sufficient to show that defendant had hit the victim on the head with the plastic drawer. As to count 2, the evidence indicated that defendant had hit the victim several times in the head, causing a bump on her forehead. Defense counsel urged that such had not been proven at the preliminary hearing. The court stated, "Right. And actually, I did the preliminary hearing. And after reviewing the transcript, it appears the drawer was not the item in question, it was the plastic bottle. So as to Count I, I'm going to grant the motion."

The People appeal the rulings of the trial court on the motion to dismiss, and the motion to reduce count 2 to a misdemeanor.

ANALYSIS

I. The Court Improperly Dismissed Count 1

The People argue, with some force, that it is improper for the same judge to sit as a superior court in review of that judge's findings as a magistrate at the preliminary

hearing.[2] The function of the superior court in a motion to dismiss under section 995, "is to review the sufficiency of . . . the information on the basis of the record made before . . . the magistrate at the preliminary hearing." (*People v. Crudgington* (1979) 88 Cal App 3d 295, 299 [4th Dist, Div 2], superseded by statute as stated in *People v. Preston* (1996) 43 Cal App 4th 450, 461 [4th Dist, Div 2].) "In *People v. Laiwa* (1983) 34 Cal.3d 711, 718, our Supreme Court explained both the standard of review of a decision on a Penal Code section 995 motion and the relevant roles of the superior and appellate courts therein: '[I]n proceedings under section 995 it is the magistrate who is the finder of fact; the superior court has none of the foregoing powers, and sits merely as a reviewing court; it must draw every legitimate inference in favor of the information, and cannot substitute its judgment as to the credibility or weight of the evidence for that of the magistrate. [Citation.] On review by appeal or writ, moreover, the appellate court in effect disregards the ruling of the superior court and directly reviews the determination of the magistrate holding the defendant to answer. [Citations.]' [Citation.]" (*People v. Scott* (1999) 76 Cal.App.4th 411, 415-416.) Similarly, in *People v. Superior Court (Lujan)* (1999) 73 Cal App 4th 1123, the court explained: "'In proceedings under [section] 995 it is the magistrate who is the finder of fact; the superior court . . . sits merely as a reviewing court; it must draw every legitimate inference in favor of the information, and

[2] Defendant urges that the People forfeited the right to raise the issue on appeal by failing to raise it below. We may exercise our discretion to review the claim, however, if it involves an important issue of constitutional law or a substantial right, or apparently does so. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887.) As it turns out, the question of forfeiture, like the disqualification issue itself, need not be decided here.

cannot substitute its judgment as to the credibility or weight of the evidence for that of the magistrate. [Citation.] On review by appeal or writ, moreover, the appellate court in effect disregards the ruling of the superior court and directly reviews the determination of the magistrate holding the defendant to answer.' [Citations.]" (*Id.* at p. 1127.)

As the People point out, a judge is disqualified from acting in a proceeding where the judge harbors a substantial doubt as to his or her capacity to be impartial. (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(ii).) "If a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts concerning the judge's impartiality, disqualification is mandated. The existence of actual bias is not required." (*Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170.) Generally, one may fairly doubt the impartiality of a judge sitting in the capacity of a reviewing court over that judge's own rulings in a different capacity. (Cf. *Knouse v. Nimocks* (1937) 8 Cal.2d 482, 484 [former Code of Civil Procedure section 170a provided that a justice or judge before whom a cause or question may have been tried or heard shall not sit or act in an appellate tribunal, on the trial or hearing of such cause or question; a judge who had ruled on a demurrer in the trial court was disqualified from participating in decision of the cause at the Court of Appeal; former Code of Civil Procedure section 170a now refers to Code of Civil Procedure section 170.1, subd. (b)]; *Giometti v. Etienne* (1934) 219 Cal. 687, 689 [appellate judges are subject to the rules applicable to judges generally re: disqualification].)

Code of Civil Procedure section 170.1, subdivision (b), provides that "A judge before whom a proceeding was tried or heard shall be disqualified from participating in

any appellate review of that proceeding." It is an interesting question whether a judge sitting as a superior court on a motion to dismiss under Penal Code section 995, which is in the nature of a review of the magistrate's findings, strictly meets the definition of "appellate review" of the proceeding conducted by a magistrate. We need not decide this issue, however, inasmuch as the trial court's ruling on the motion to dismiss was erroneous in any event.

"In ruling on a motion to set aside an information under . . . section 995, the superior court is required to view the evidence presented to the magistrate in the light most favorable to supporting the determination of the magistrate and must indulge in all reasonable inferences which would support the decision of the magistrate. In reviewing the correctness of the superior court's order in setting aside the information we apply the same test to determine whether there was sufficient evidence to support the magistrate's decision. [Citations.]" (*People v. Topp* (1974) 40 Cal.App.3d 372, 374.)

The court below clearly abandoned the proper standard of review. The court relied on its review of the transcript, and purportedly recalled that "it appears the drawer was not the item in question; it was the plastic bottle. So as to Count I, I'm going to grant the motion." The court's remarks are mystifying, as an inspection of the preliminary hearing transcript contains absolutely no reference whatsoever to any plastic bottle. The only discussion of the plastic object with which the victim was supposedly assaulted was the plastic drawer, in which defendant apparently kept clothes. The only object that the victim said defendant had thrown was the plastic drawer, though she denied that defendant had hit her with it, and did not suggest that defendant had thrown it at her.

Besides remembering or discovering nonexistent testimony, the trial court failed to give proper deference to the findings she had made as a magistrate. She reweighed evidence rather than taking the evidence in the light most favorable to the determinations she had made earlier; likewise she failed to indulge inferences in favor of her earlier rulings.

The sole reason given for dismissing count 1 was the court's conjuring up a plastic bottle in place of the plastic drawer that was the subject of inquiry at the preliminary hearing. The victim was questioned about her reports to the police at the time of the incident. She admitted telling police various matters that she supposedly reported to them. She attempted, however, to deflect, deny and excuse those reports. She intimated that she had lied to police because she was upset with defendant, or had inflicted injuries herself, or in some other manner minimized defendant's involvement in the violent acts she had reported to police. Thus, the victim denied telling police that defendant had hit her in the back of the head with the plastic drawer. She did admit, however, that he had had it in his hands at some point during the altercation, and she admitted that he had thrown it. Other evidence cast doubt on the victim's attempts to minimize defendant's conduct, and tended to support the inference that her initial reports to police were accurate. For example, although the victim deflected defendant's destruction of property from a "mirror" to a picture frame, she at least once said he had broken a mirror, but caught herself and then substitute the term picture frame instead. The "mirror" was apparently a mirrored closet door that the victim claimed to have kicked herself. The victim also admitted that she and defendant had been chasing one another through the

house during the argument. The evidence supported a reasonable inference that defendant's conduct during the altercation had been much more violent than the victim's preliminary hearing testimony endeavored to portray.

The magistrate was required only to have some rational ground for assuming the possibility that the defendant had committed an offense. (*Guevara v. Superior Court* (1998) 62 Cal.App.4th 864, 869.) The evidence here was sufficient to meet that standard.

The trial court thus erred in granting the motion to dismiss as to count 1, assault with the plastic drawer.

II. The Court Improperly Reduced the Charge in Count 2 to a Misdemeanor

The People also argue that the trial court lacked the power to reduce the charge in count 2 (corporal injury) to a misdemeanor before defendant's trial and judgment. Defendant concedes the point.

Where a magistrate has held a defendant to answer for a felony offense, and bound the defendant for trial in the superior court, the power of the magistrate to reduce a felony charge to a misdemeanor under section 17, subdivision (b)(5), has been exhausted. Thereafter, the superior court may reduce a felony offense to a misdemeanor only at the time of sentencing. (§ 17, subd. (b)(1)-(2); see *People v. Silva* (1995) 36 Cal.App.4th 231, 234-235.)

DISPOSITION

The trial court's orders, dismissing count 1 of the information, and reducing count 2 to a misdemeanor, are reversed. The trial court is directed to reinstate the dismissed assault charge in count 1, and to reinstate the domestic violence charge as a felony.

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/s/ McKINSTER
J.

We concur:

/s/ RAMIREZ
P.J.

/s/ RICHLI
J.